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Supreme Court, U.S.
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NO. 00-258

IN THE
SUPREME COURT OF THE UNITED STATES

ANTHONY FLETCHER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was petitioner's claim that the trial court unconstitutionally restricted his testimony at the penalty hearing presented to or passed on by the court below?

(Not raised or considered in the court below.)

2. Where the trial court did not prevent petitioner from testifying that the murder was not drug related, was petitioner denied his right to testify?

(Not raised or considered in the court below.)

3. Was petitioner's claim that the trial court violated the confrontation clause by admitting Ronald Williams' statement presented to or passed on by the court below.)

(Not raised or considered in the court below.)

4. Where Ronald Williams' statement was admissible under two hearsay exceptions, did the court err in admitting the statement?

(Not raised or considered in the court below.)

5. Was petitioner's claim that the prosecutor unconstitutionally argued for a capital sentence presented to or passed on by the court below?

(Not raised or considered in the court below.)

6. Where the prosecutor did not criticize petitioner for failing to present his version of the offense; properly challenged the credibility of petitioner's testimony; and

did not improperly seek a capital sentence based on vengeance, were those remarks constitutionally impermissible?

(Not raised or considered in the court below.)

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OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reproduced at petitioner's Appendix A and is also reported at 561 Pa. 266, 750 A.2d 261 (2000).

JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. § 1257(a).

COUNTER-STATEMENT OF THE CASE

Petitioner shot a man to death on a street corner for his failure to pay drug-trafficking proceeds. A Pennsylvania jury convicted petitioner of murder of the first degree and possessing an instrument of crime (Biils Nos. 6001, 6003, March Term, 1992). The jury sentenced petitioner to death. It found that in committing the offense petitioner knowingly created a grave risk of death to another person in addition to the victim of the murder; and that petitioner committed the murder to promote his drug activities.[1] Petitioner seeks certiorari.

Petitioner was a drug dealer in Southwest Philadelphia in March, 1992. At the beginning of that month, he consigned a package of crack cocaine to Vaughn Christopher, the victim, to sell. Christopher either smoked the crack himself or spent the money from the sale of the drugs; he failed to pay petitioner the proceeds. Sometime after midnight on March 2, 1992, Christopher was standing on a sidewalk in the 2000 block of South 60th Street talking to Ronald "Skeet" Williams and Natalie "Ne Ne" Grant. Petitioner approached the group and asked Christopher for the proceeds of the crack sale (N.T. 1/20/93, 22, 31; 1/21/93, 10-11; 1/22/93, 6-9; 2/1/93, 27-31, 57).

Before Christopher could respond, petitioner drew a silver .380 caliber semi-automatic pistol from beneath his jacket and fired a shot at Christopher's feet while Christopher stood next to Williams and Grant. Christopher began to flee; petitioner pursued. Petitioner aimed at Christopher and fired two more shots. One bullet struck the victim in the right flank and perforated his right kidney, liver and chest wall.

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[1] The jurors found two mitigating circumstances.

The second bullet passed through the victim's right thigh. Christopher fell against a parked car. He called out to Williams for help; Williams declined to intervene (N.T. 1/19/93, 116; 1/20/93, 4; 1/21/93, 10-13, 57; 1/25/93, 90-94; 1/26/93, 12-15; 2/1/93, 25, 32-33).

Christopher careened down the street, turned the corner and stumbled down the 5900 block of Greenway Street, where he collapsed against a fence. Several minutes later, the police found him there, unconscious. Emergency personnel were summoned and rushed him to the hospital, where he was pronounced dead (N.T. 1/19/93, 63-69; 1/21/93, 11).

Petitioner left the murder scene, changed his clothes, and returned. Upon encountering Williams and Grant, he told them, "You all better tell that boy he better not tell who shot him." He then left the scene. Six days later, petitioner encountered Grant on a street corner. Referring to the murder, he said that he had been told that Grant was planning to "snitch" on him. Grant denied that she had spoken to the police. Petitioner told her that "Skeet" had told him he should kill her. Grant promised petitioner that she would not tell the police what she knew about the murder (N.T. 1/22/93, 13-17).

Several days later, petitioner came to Grant's home. Instead of threatening her again, he gave her money. A few days later, however, Grant heard that petitioner's friends were looking for her and that there was a planned "hit" on her, which she understood to mean a plan to murder her (N.T. 1/22/93, 17, 117; 1/25/93, 15).

After receiving information from witnesses to the murder, the police arrested petitioner. Petitioner waived his Miranda rights and gave a statement. He declared that he had

an altercation with the victim on the night of the murder. Petitioner, a former professional boxer, claimed that he punched the victim in the face in retaliation for the victim's robbery of him several days earlier. According to petitioner, the victim then drew a handgun, and petitioner grabbed him. During the struggle, the victim allegedly shot himself with his own gun (N.T. 1/25/93, 65-80).[2]

Petitioner was tried by a Pennsylvania jury sitting before the Honorable Robert A. Latrone. On January 29, 1993, the jury found petitioner guilty of murder of the first degree and possessing an instrument of crime. At the penalty hearing, the Commonwealth established the aggravating circumstances that in committing the offense petitioner knowingly created a grave risk of death to another person in addition to the victim of the offense;[3] and that petitioner committed the murder to promote his drug activities.[4] Petitioner sought to prove mitigation with evidence of his character and the circumstances of his offense;[5] and that he was under the influence of extreme mental or emotional

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[2] Petitioner attempts to minimize the evidence of the drug-related nature of the murder (Petition at 3). However, as he notes in the Statement of the Case, further evidence that petitioner killed the victim for using petitioner's crack instead of selling it is provided by the fact that the victim had recently-ingested cocaine in his system at the time of his death (Petition at 2).

[3] 42 Pa.C.S.A. § 9711 (d) (7).

[4] 42 Pa.C.S.A. § 9711 (d) (14).

[5] 42 Pa.C.S.A. § 9711 (e) (8).

disturbance.[6] The jury found two aggravating and two mitigating circumstances. On February 5, 1993, the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances, and returned a verdict of death. Post-verdict motions were filed. New counsel was appointed and filed supplemental post-verdict motions. On December 26, 1995, after a hearing, the judge denied petitioner's post-verdict motions. On February 21, 1996, the judge formally reimposed petitioner's death sentence and imposed a concurrent two and one half to five year sentence for possessing an instrument of crime.

On appeal to the Pennsylvania Supreme Court, petitioner raised twenty-seven claims of error, including assertions that he was deprived of his right under Pennsylvania law to demonstrate that the murder was not drug related; that trial counsel was ineffective, under Pennsylvania law, for failing to object to the cross-examination of Ronald Williams with an alleged hearsay statement; and that trial counsel was ineffective, under Pennsylvania law, for failing to object to the prosecutor's assertion at the penalty hearing that the murder was drug related.

On March 24, 2000, the Pennsylvania Supreme Court affirmed petitioner's judgments of sentence. Commonwealth v. Fletcher, 561 Pa. 266, 750 A.2d 261 (2000). Petitioner filed an Application for Reargument, which was denied on May 15, 2000.

In this Court, petitioner claims, for the first time, that he was deprived of constitutional rights when he was allegedly prevented from testifying that the murder was not drug-related. Additionally, he changes his previous claim -- that

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[6] 42 Pa.C.S.A. § 9711 (e) (2).

counsel was ineffective for failing to object to the examination of Ronald Williams with his alleged hearsay statement -- and instead argues that the Pennsylvania Supreme Court erred in approving the use of the statement. Finally, petitioner transforms another prior claim -- that trial counsel was ineffective for failing to object to the prosecutor's assertion at the penalty hearing that the murder was drug related -- into a claim that the prosecutor committed misconduct by commenting on petitioner's failure to explain the circumstances of the murder when he testified at the sentencing hearing; by allegedly commenting on petitioner's right to silence when he argued that petitioner's testimony was not really remorseful; and by urging the jury not to decide the penalty merely by exercising mercy on petitioner. Despite petitioner's attempt to invoke this Court's jurisdiction by re-fashioning his claims, no such claims were properly raised or preserved below, and none presents significant issues. Accordingly, review should be denied.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S CLAIM THAT THE COURT ERRONEOUSLY RESTRICTED HIS TESTIMONY AT THE PENALTY HEARING IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner shot and killed Vaughn Christopher. He was convicted of murder of the first degree. Petitioner declined to testify at trial. At the penalty hearing, petitioner and his witnesses provided extensive testimony in support of mitigation, and denied that he had any involvement with drugs. The only limitation placed on his testimony was that he could not deny committing the murder altogether. Petitioner made no objection to this proper limitation. Instead,

he repeatedly denied any involvement with drugs, but understandably chose not to present the specific testimony that he now claims was excluded: that is, testimony that he really did murder the victim in cold blood, but that he did not do it because of drugs. Accordingly, because he did not object to the only limitation actually imposed by the trial judge, he may not have review of his claim. See United States v. Gignac, 119 F.3d 67, 69-70 (1st Cir.), cert. denied, 522 U.S. 975 (1997) (defendant's failure to object at trial to evidentiary ruling precludes appellate review).[7]

In any case, the claim does not present a meritorious federal question. The trial court did not improperly limit petitioner's testimony, and did not prevent him from conceding first degree murder while offering an alternative motive, as an examination of the record demonstrates.

At the outset of the penalty hearing, counsel advanced a series of motions that petitioner had asked him to make.[8]

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[7] Petitioner makes no attempt to excuse his waiver of his claim; he simply asserts that the court erred, as if he had objected at the time. In reality, there was no objection at trial because the trial court never imposed the limitation petitioner now raises as error. See infra.

[8] These included, inter alia, an objection to the court's refusal to give a voluntary manslaughter instruction; a motion to reduce petitioner's conviction to murder of the third degree; a motion to preclude the prosecution from presenting evidence to support the aggravating circumstance involving endangering others in the course of the murder; a motion for a mistrial based on the introduction of Ronald Williams' statement; a motion to preclude the prosecution from proving the aggravating circumstance of a drug-related killing; and a motion for the appointment of new counsel (N.T. 2/1/93, 3-6).

Counsel then informed the court that he had told petitioner that he believed the court would not allow him to testify concerning "the facts" of the killing:

> I have advised [petitioner] that preliminarily ... if [petitioner] testified in this matter about the facts of the case in terms of what happened, that the court would prohibit that testimony....

N.T. 2/1/93, 7. The court, however, corrected counsel's assertion, indicating that it would only preclude testimony that was offered to exculpate defendant for the crimes of which he was convicted:

> The defendant trying to testify at the penalty stage in exculpation of his criminal culpability as to the charge for which he stands trial is an inappropriate area of inquiry and inadmissible evidence....
>
> * * * * * *
>
> He has the right to take the witness box in his own behalf, but he cannot testify to exculpate himself from the verdict of guilt.

N.T. 2/1/93, 7-9.[9] Petitioner then presented a penalty defense, including his own testimony. He chose not to present extensive testimony concerning the circumstances of the murder. He did, however, deny any involvement with drugs. He also specifically asserted both that he had turned down an offer from some Jamaican men to serve as a bouncer at a drug house and that he had never sold drugs (N.T. 2/2/93, 138-40, 145). Additionally, the jury knew from the admission at trial of petitioner's statement (which was incorporated into the record of the penalty hearing), that petitioner claimed that the murder arose from a prior robbery during a craps game and not from circumstances relating to drugs (N.T. 1/25/93, 76-80; 2/2/93, 20).[10]

Significantly, the only portion of the transcript petitioner cites to support his assertion that the trial court prevented him from testifying that the killing was not drug related is a colloquy between defense counsel and petitioner during which the court does not speak at all. During that

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[9] Counsel then stated that he had advised petitioner that, if petitioner "were to suggest or testify that he was not a person engaged in drug-related activity, that on rebuttal, the Commonwealth would be permitted to introduce into evidence [petitioner's] prior conviction for drugs" (N.T. 2/1/93, 9).

[10] Petitioner reads the Pennsylvania Supreme Court's opinion to support his assertion that he was prevented from testifying that the murder was not drug-related (Petition at 12). He is mistaken. The Pennsylvania Supreme Court noted that petitioner's claim was that he was prevented from testifying that the shooting was not drug-related. However, the Court properly held that the trial court only prevented petitioner from testifying that he was not guilty of the murder. Nowhere did the Pennsylvania Supreme Court hold that petitioner was prevented from testifying that the shooting was not drug-related. Commonwealth v. Fletcher, 750 A.2d 261, 277.

colloquy -- in which counsel sought to persuade petitioner not to testify -- counsel mischaracterizes the nature of the court's ruling, portraying it as more limiting than it was (N.T. 2/2/93, 105-06). This is hardly support for the proposition that the court denied petitioner his right to testify. Moreover, the decision to focus petitioner's testimony on favorable elements of his character, and not to concede that he had in fact committed a cold-blooded murder but had done so over of a robbery during a craps game and not drugs, was well-chosen. It is unimaginable -- regardless of petitioner's argument that he could have defeated an aggravating circumstance with testimony that the murder was over gambling and not drugs -- that a jury would have been more sympathetic as a result of such testimony, and very likely both that the jury would have returned a capital sentence and that petitioner would now be challenging counsel's decision to have him concede committing the murder but disputing his motive.[11]

Petitioner's cases are factually distinguishable from this case. The transcript here shows that the trial court did not improperly restrict his penalty testimony. Thus, Rock v. Arkansas, 483 U.S. 44 (1987) (finding unconstitutional Arkansas' categorical prohibition of hypnotically-refreshed testimony); Crawford v. United States, 212 U.S. 202 (1909) (non-constitutional decision holding that an accused may testify at a trial about his motive in taking an action); and Crane

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[11] Petitioner makes a related meritless assertion that the prosecutor was improperly permitted to "relitigate" petitioner's drug-related motive by presenting evidence at the penalty hearing of his involvement with drugs (Petition at 13). Because the prosecutor was seeking the application of the aggravating circumstance pertaining to a drug-related killing, evidence of petitioner's connection with drugs was relevant and admissible at the penalty hearing. Petitioner was free to address the issue as well.

v. Kentucky, 476 U.S. 682 (1986) (that a confession has been found voluntary by a judge prior to trial does not preclude a trial challenge of the reliability of the confession; it is the jury's role to determine witness credibility), do not avail him. Petitioner was entitled to testify to the applicability of aggravating and mitigating circumstances, including the circumstances of the offense. The court did not prevent him from doing so; he was free to admit the murder but claim it arose from a non-drug motivation. He in fact did present evidence that he was not involved in drug-selling, and the jury had before it his statement that the killing arose out of a gambling dispute. That petitioner chose not to do more is in no way akin to a ruling that prevented him from doing so.

II. PETITIONER'S CLAIM THAT THE TRIAL COURT IMPROPERLY ADMITTED AN ALLEGED HEARSAY STATEMENT IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner asserts that the Pennsylvania Supreme Court violated the confrontation clause by approving the admission of the victim's statement to Ronald Williams that he had smoked some drugs he was supposed to sell for petitioner (Petition at 13-20).[12] This claim is unreviewable for multiple reasons. First, petitioner raised no such claim of court error below; instead he claimed only that trial counsel was ineffective for failing to object to the cross-examination of Williams with the victim's alleged hearsay statement, thereby explicitly conceding his failure to object to the introduction of the statement at trial. The Pennsylvania Supreme

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[12] The victim had actually told Williams "that he had f_ed up a package of dope that belonged to [petitioner]. He smok[ed] up all the crack in the package[.]"

Court reviewed and rejected petitioner's claim as a claim of ineffective assistance of counsel. Commonwealth v. Fletcher, 750 A.2d at 275-76. Petitioner's claim that the statement's admission constitutes court error is therefore raised for the first time in this Court and is, therefore, unreviewable. United States v. Williams, 504 U.S. 36 (1992); Illinois v. Gates, 462 U.S. 213 (1983); United States v. Ortiz, 422 U.S. 891 (1975).

Moreover, even in the guise of his ineffective assistance claim, petitioner did not assert a violation of the confrontation clause below; his claim addressed only Pennsylvania law.[13] For this reason as well, petitioner's claim is improperly presented to this Court and unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.[14]

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[13] In his brief to the Pennsylvania Supreme Court, referring to the trial testimony of Ronald Williams at N.T. 1/29/93, 36-44, petitioner claimed that his "trial counsel was ineffective in failing to object to hearsay testimony...describing a motive for the shooting" (emphasis supplied). In his argument, petitioner related that a statement introduced on cross-examination indicated that the victim had "received from [defendant] a package of drugs but failed to account for the proceeds thereof." Petitioner complained that "Such testimony was clearly hearsay, but defense counsel did not object thereto." Petitioner's ineffectiveness claim did not mention any constitutional theory of denial of confrontation rights. The sole and very specific basis of the ineffectiveness claim was trial counsel's failure to object to "hearsay testimony." This invoked the state law of evidence, not the confrontation theory to which petitioner now turns in hindsight. Petitioner's brief did not even mention the word "confrontation."

[14] Petitioner's assertion, in a post-appeal petition for

(Continued)

That petitioner raised an unsuccessful ineffectiveness claim based on a hearsay theory on appeal does not entitle him to raise, on petition to this Court, an entirely new claim (based in significant part on Lilly v. Virginia, 527 U.S. 116 (1999), handed down years after the supposed ineffectiveness took place) based on a confrontation theory. As explained by this Court in California v. Green, 380 U.S. 149 (1970), a hearsay theory is not a confrontation theory:

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different

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(Continued)

reargument, of a Confrontation Clause violation does not preserve the claim. This Court has repeatedly refused to consider claims that are raised for the first time in a petition for rehearing when the state court has summarily denied the petition, as here. Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 1031 n.3 (1997); Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550 (1987); Hanson v. Denckla, 357 U.S. 235, 244 n.4 (1958). The Pennsylvania Supreme Court did not address the reargument's newly-asserted federal claims. Petitioner may not have review of them in this Court.

Petitioner cannot revive his waived claim by asserting that the Pennsylvania Supreme Court implicitly considered his claim in its review to determine whether the capital sentence was the result of "passion, prejudice, or any other arbitrary factor" (Petition at 8 n.3). The Court considered the claim petitioner raised. There is absolutely no reason to believe it considered and silently rejected a federal claim petitioner did not assert, while simultaneously ignoring the fact that it arose as an ineffectiveness claim.

> thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception ... the converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.

380 U.S. at 155-56; Dutton v. Evans, 400 U.S. 74, 81-82 (1970).

Petitioner's claim, even had it been preserved, would not present a meritorious question. The confrontation clause was not offended by the admission of the victim's statement to Williams about messing up the drugs under either of two established exceptions to the hearsay rule, admissions against interest and state of mind.

The confrontation clause permits the admission of hearsay statements against a defendant, despite his inability

to confront the declarant at trial, where the declarant is unavailable and the statement bears adequate indicia of reliability. Ohio v. Roberts, 448 U.S. 56, 66 (1980). Where a declarant makes a statement inculpating both himself and another, with no attempt to limit his own exposure to criminal liability, his statement will be regarded as a firmly-rooted exception for confrontation clause purposes. United States v. Barone, 114 F.3d 1284, 1302 (1st Cir.), cert. denied, 522 U.S. 1021 (1997). As the Second Circuit has repeatedly held, a statement incriminating the declarant and another person possesses adequate reliability if it is made to an ally, rather than a law enforcement officer, and the circumstances surrounding the inculpation of the other person provide no reason to suspect that that portion is less reliable than the part that incriminates the declarant. Such reliability is present where the statement is volunteered by the declarant to a friend, with no coercive pressures from or attempt to curry favor with authorities; no reason to expect that his admission will ever be disclosed to authorities; and no attempt to shift blame or minimize his own culpability. United States v. Sasso, 59 F.3d 341, 349 (2nd Cir. 1995), citing United States v. Matthews, 20 F.3d 538, 546 (2d Cir. 1994).[15]

The circumstances justifying the admission of a statement against interest as a firmly-rooted hearsay exception are present in the declarant's statement to Ronald Williams. Ronald Williams was friendly with petitioner, whom he knew as "Ant Man." The declarant's confiding to Williams that he had messed up a package of crack belonging to petitioner was clearly not made under the desire to curry favor with authorities or with the expectation that Williams,

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[15] The same analysis applies under Federal Rule of Evidence 804(b)(3). United States v. Shukri, 207 F.3d 412, 417 (7th Cir. 2000).

petitioner's friend, would disclose it to the authorities. Petitioner was not on trial for drug possession and the declarant had nothing to gain from implicating him. The statement was assuredly not made with the knowledge that petitioner would subsequently murder the declarant. Moreover, the declarant's statement made no attempt to shift blame or minimize his responsibility for drug activity; he admitted possession and use of the crack (N.T. 1/20/93, 22-23; 1/21/93, 10-11). He had no reason to inculpate himself in a crime if the statement were not true. The declarant undoubtedly had personal knowledge of the truth of the matter he spoke about, he volunteered the statement and there is no reason to suspect he was not telling the truth. Thus, the self-incriminating nature of the statement, and the circumstances under which it was made, enable it to pass confrontation clause muster as an admission against interest, both as a firmly-rooted exception and because the statement contains sufficient indicia of reliability. United States v. Sasso, supra (declarant's statement to girlfriend implicating self and defendant admissible under firmly rooted hearsay exception as admission against interest); United States v. Matthews, supra (same); United States v. McManaman, 653 F.2d 458, 461 (10th Cir. 1981) (emphasizing importance of declarant's personal knowledge of events); Barker v. Morris, 761 F.2d 1396, 1402 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986) (emphasizing importance of voluntary nature of statement); United States v. Chappell, 698 F.2d 308, 313 (7th Cir.), cert. denied, 461 U.S. 931 (1983) (emphasizing importance of declarant's lack of motivation to lie).[16]

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[16] In his discussion of the state of mind exception, addressed infra, petitioner cites Lilly v. Virginia, 527 U.S. 116 (1999), for the proposition that declarations against interest are not firmly-rooted exceptions to the rule against the admission of hearsay

(Continued)

In addition, the declarant was obviously reporting his own state of mind. His statement expressed his concern and apprehension that petitioner had reason to be angry with him, because he had "smoked up" drugs he had obtained from

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(Continued)

(Petition at 16-17). Petitioner's reliance is misplaced. First, the portion of the Lilly opinion on which petitioner relied is a plurality opinion and has no precedential value. Second, Lilly was decided long after petitioner's trial and could not have been anticipated. Third, the Lilly plurality discussion does not declare that all declarations against interest are not firmly-rooted hearsay exceptions. Instead, it divides declarations against penal interest into three types: (1) voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence of the guilt of an alleged accomplice of the declarant. The plurality declares the first type of statement to be a firmly-rooted exception; that the second type, traditionally offered by the accused, does not implicate the confrontation clause; and that the third type - accomplices' confessions that inculpate a criminal defendant - is not a firmly rooted exception.

The victim's statement to petitioner's friend is most akin to a statement of the first type. It was not a confession to police, it did not attempt to minimize the victim's responsibility for the drug offense, and it did not attempt to exculpate petitioner. In implicating himself in a drug offense, the victim could not possibly have known that his words would later implicate defendant in a murder in which he would be the victim. Moreover, the courts that have analyzed the specific factual situation presented by the victim's statement here -- an admission of declarant's and someone else's criminal wrongdoing to a friend, with no attempt to diminish the declarant's own responsibility and no expectation that the admission will be conveyed to the police -- have found that the statement constitutes a firmly-rooted hearsay exception. United States v. Sasso, supra; United States v. Matthews, supra.

petitioner. This qualified the statement under a second, equally sound hearsay exception, the state of mind exception to the hearsay rule; his mental state suggested a motive for petitioner to have killed him. See, e.g., Moore v. Reynolds, 153 F.3d 1086, 1107 (10th Cir. 1998), cert. denied, 526 U.S. 1025 (1999) (victim's statement that he feared appellant admissible in appellant's trial for his murder under the state of mind exception to the hearsay rule; and opining that state of mind is a firmly rooted hearsay exception); Barber v. Scully, 731 F.2d 1073 (2d Cir. 1984) (victim's statement that she feared appellant was admissible evidence of her state of mind on charge of larceny of car by appellant because it tended to show whether she would have given him permission to use her car). See also United States v. Vretta, 790 F.2d 651, 660 (7th Cir.), cert. denied, 479 U.S. 851 (1986) (confrontation clause not offended by admission of victim's reports that the appellant had been threatening him in appellant's prosecution for the victim's murder).

Moreover, even if the court had erred in admitting evidence of the victim's statement to Williams, no relief would be due. As already explained, petitioner's conviction was not the product of the victim's statement that he had messed up a package of drugs for petitioner, but of the testimony of an eyewitness that petitioner walked up to the victim, confronted him and shot him repeatedly.[17]

[17] Petitioner asserts that Shepard v. United States, 290 U.S. 96 (1933), defeats the admission of the victim's statement. In Shepard, a doctor was convicted of poisoning his wife on the basis of her statement, made to a nurse just before her death, "Dr. Shepard has poisoned me." The Shepard decision makes no mention of the confrontation clause, for the simple reason that the confrontation clause was not in issue. The Shepard court held, as a matter of the law of **evidence**, that the statement, "Dr. Shepard

(Continued)

Indeed, the testimony in question here not only failed to offend the confrontation clause, the same result would apply even under Pennsylvania law. The declarant's statement was admissible as both an admission against penal interest, Commonwealth v. Goldblum, 498 Pa. 455, 447 A.2d 234 (1982) (declarant's statement that he had conspired with appellant to commit arson at appellant's trial for murdering declarant admissible as admission against penal interest), and under the state of mind exception, Commonwealth v. Puksar, 559 Pa. 358, 368 n.6, 740 A.2d 219, 225 n.6 (1999), cert. denied, (U.S. 10/2/00) (victim's statement that he did not trust appellant and that the victim and appellant were involved in a dispute admissible evidence of state of mind); Commonwealth v. Chandler, 554 Pa. 401, 411, 721 A.2d 1040, 1045 (1998) (murder victim's statement to her mother regarding breakdown in relationship with accused admissible

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(Continued)

has murdered me" was not admissible under the state of mind exception, where it was erroneously offered as a dying declaration, and referred to "a past act, and, more than that, to an act by some one not the speaker." 290 U.S. at 105.

Further, Shepard is factually inapposite to this case. Here, the declarant referred only to his own actions, not past actions of the defendant. He referred to his own actions, moreover, only to explain his own contemporaneous state of mind, and in so doing incriminated himself in a drug crime. The statement here was not merely admissible, it was unusually reliable.

Petitioner's citation to Shepard for the additional proposition that the jury's having heard the victim's "voice beyond the grave" added to the alleged prejudice (Petition at 19), is misplaced. Unlike the voice in Shepard, the victim was not heard posthumously to accuse petitioner of murdering him, but to admit to drug-dealing with a friend.

as state of mind); Commonwealth v. Collins, 550 Pa. 46, 58-60, 703 A.2d 418, 424-25, cert. denied, 525 U.S. 1015 (1998) (victim's statement that appellant had shot her in the past and would shoot her in the head if she messed up a drug package admissible as state of mind).

Finally, in addition to the confrontation clause claim, petitioner also throws in a one-paragraph argument that the trial judge's jury charge was improper because he allegedly opined that the testimony concerning the drug deal established motive (Petition at 20). Petitioner failed to object to the court's instruction at trial, thereby waiving any possible claim. United States v. Gignac, supra.

Additionally, the court thoroughly and repeatedly instructed the jurors that they were the finders of fact, notwithstanding any comments by the court or the attorneys. The court further instructed the jury to disregard any statement of the court that did not accurately reflect its own recollection (N.T. 1/19/93, 34; 1/29/93, 28, 30-38). Finally, after summarizing the prosecution's evidence of motive, the court emphasized that:

> [Y]ou [the jurors] make your own determination... It is entirely up to you to determine what weight, if any, should be given to the evidence concerning motive in this case.

N.T. 1/29/93, 57-59). Accordingly, there is no merit to petitioner's claim.

III. PETITIONER'S CLAIM THAT THE PROSECUTOR COMMITTED MISCONDUCT IN HIS PENALTY HEARING CLOSING ARGUMENT IS WAIVED; IT ALSO FAILS TO PRESENT A MERITORIOUS FEDERAL QUESTION.

Petitioner claims that the prosecutor committed misconduct of constitutional proportion during his comments at the penalty hearing (Petition at 20-25). Petitioner's claims are unreviewable. Petitioner raised no objection at trial to the remarks he now assails on multiple grounds. Accordingly, petitioner may not have review of his claims that the prosecutor violated the constitution. United States v. Gignac, supra. Indeed, petitioner claimed in his state court appeal that trial counsel was ineffective for failing to object to the prosecutor's remarks, thereby explicitly conceding his failure to object to them at trial. The Pennsylvania Supreme Court reviewed and rejected petitioner's claim as a claim of ineffective assistance of counsel. Commonwealth v. Fletcher, 750 A.2d at 280. Petitioner's present claim that the remarks were reversible error in themselves is therefore raised for the first time in this Court and, therefore, unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.

The claims are unreviewable for an additional reason: petitioner's ineffective assistance challenge regarding the remarks was different than his present argument about them. Petitioner claimed below that trial counsel was ineffective because the prosecutor's remarks about petitioner's drug motive were irrelevant and prejudicial, and therefore improper as a matter of Pennsylvania law. Commonwealth v. Fletcher, 750 A.2d at 280. Now petitioner is claiming that the prosecutor violated the federal constitution by commenting that petitioner failed to explain the circumstances of the

crime; that petitioner lacked remorse; and that the jury should exercise vengeance toward petitioner. Thus, even putting aside petitioner's abandonment of the ineffective assistance theory that was the only claim preserved below, petitioner's present constitutional attacks on the prosecutor would still be new, and are therefore unreviewable. United States v. Williams, supra; Illinois v. Gates, supra; United States v. Ortiz, supra.

Even if reviewable, petitioner's claims would not present a meritorious federal question. Petitioner first asserts that the prosecutor improperly commented on his failure to explain the circumstances of the offense, particularly in light of the trial court's alleged ruling prohibiting him from discussing those circumstances. That is not what happened. At the outset of his penalty hearing testimony, petitioner stated that he wanted to pay his respects to the victim's family. He returned to that subject at the conclusion of his direct testimony, and explained that he felt "hurt" at the victim's death, and later declared, "I feel sorry for the family. I know they wish he was here and I wish personally he was here. I swear to God, I wish he was here." Petitioner also denied that he had any involvement with drugs, denied selling drugs and asserted that he had declined an offer to serve as a bouncer at a drug house (N.T. 2/2/93, 115, 128, 138-39, 145).

In that context, it is clear that the prosecutor's remarks did not criticize petitioner for failing to explain the circumstances of the murder or for exercising his constitutional right to silence, and did not constitute an appeal to vengeance. Rather, the prosecutor criticized the testimony petitioner did offer on those matters as being insincere:

> When [petitioner] took the
> stand yesterday and had people

> testify on his behalf, if there was a real reason for his activities in dealing drugs and there was a real sense of honesty and true remorse about his killing of [the victim] because of drug involvement, he would have told you; he would have admitted it like a man and he would have, at that time, asked you for mercy. But, that has never happened in this case, so, I submit to you, the time for mercy is long since past.

N.T. 2/3/93, 7.[18]

As previously addressed in response to petitioner's first claim, the court did not prohibit petitioner from offering his version of the offense; the court merely held that he could not attempt to exculpate himself by denying the murder altogether. Additionally, the prosecutor's remarks went not to petitioner's failure to explain the circumstances relating to the murder, but rather to the credibility of the explanation he did offer, namely his assertion that he was not involved with drugs. Accordingly, the prosecutor's remarks were proper.

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[18] The prosecutor concluded by stating:

> I'm not here to beg you to do anything or try to influence you to do anything. I submit to you, if you follow the law, you will do what's right for all involved here.

N.T. 2/3/93, 15.

Petitioner cites Doyle v. Ohio, 426 U.S. 610 (1976), for the proposition that a prosecutor cannot prevent a defendant from testifying as to the facts of a case and then criticize him for not testifying. In that case, the defendant's rights were found to have been violated where he exercised his Miranda right to remain silent, then testified at trial that he had been "framed," and the prosecutor impeached his trial testimony by asking him why he had not mentioned being "framed" upon his arrest. Here, the prosecutor did not prevent petitioner from testifying that the murder was not drug-related. Moreover, his attack was on the testimony petitioner offered at the penalty hearing. He did not criticize petitioner's failure to give that testimony at an earlier stage.

Nor did the prosecutor's remark implicate petitioner's right to silence for failing to express remorse. The prosecutor's criticism was directed at the nature of the remorse to which petitioner testified, and properly anticipated petitioner's argument for mercy. Defense counsel's closing argument, in which he explained that the reason petitioner testified was to express his remorse, precludes the possibility that the jury would have misinterpreted the prosecutor's remarks as a reference to silence based on an alleged failure to express remorse:

> [M]y first question to [petitioner] was "Tell me about your boxing career," and the thing that he wanted to say and the thing that he wanted to tell you and the thing that he wanted to tell the victim's family was that he was sorry and was remorseful for what he did.... So, I submit to you that

> when [the prosecutor] stands up and says to you, you learned a whole lot more [about petitioner's prior crimes], you learned about that because [petitioner] wanted to place before you his remorse for what he did.
>
> * * * * * *
>
> [Petitioner] wanted to express his remorse to the victim's family. Remorse, in and of itself, I believe, is in this situation a mitigating circumstance.

N.T. 2/3/93, 19, 30. A prosecutor may attack the sincerity of the account of events a defendant provides without thereby implicating his right to silence. Howard v. Moore, 131 F.3d 399 (4th Cir. 1997) (prosecutor's remark that defendant had not shown remorse was proper comment on the evidence presented and fair response to defense counsel's argument that defendant was indeed remorseful). See Portuondo v. Agard, 120 S.Ct. 1119, 1125 (U.S. 2000) (when a defendant takes the stand, his credibility may be impeached and his testimony assailed like that of any witness); United States v. Cabrera, 201 F.3d 1243, 1250 (9th Cir. 2000) (same); United States v. Brennan, 994 F.2d 918, 926 (1st Cir. 1993) (same). As explained, the prosecutor criticized the expressions of remorse petitioner offered; he did not chastise him for failing to offer any remorse.

Next, petitioner asserts that the prosecutor's assertion that the time for mercy had passed violated due process. The

authority he cites does not support his argument. California v. Brown, 479 U.S. 538 (1987), holds that an instruction that the jury must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not violate the Eighth Amendment. Nor does the non-precedential plurality opinion in Gregg v. Georgia, 428 U.S. 153 (1976), state that due process is violated by an argument such as the prosecutor made here. Finally, Drake v. Kemp, 762 F.2d 1449, 1458 (11th Cir. 1985), cert. denied, 478 U.S. 1020 (1986), is wholly distinguishable from this case. There, the prosecutor was found to have invoked vengeance where he read a quote from a century-old state supreme court case stating in part that "the false humanity that starts and shudders when the axe of justice is ready to strike is a dangerous element for the peace of society.... We have had too much of this mercy."

The prosecutor's argument in this case is readily distinguishable from that condemned in Drake. The prosecutor did not invoke the authority of prior supreme court decisions; his argument was not graphic; he did not argue that mercy was never appropriate; he simply argued that the jury should not apply mercy to petitioner.[19] Cf. Duvall v. Reynolds, 139 F.3d 768, 795 (10th Cir.), cert. denied, 525 U.S. 933 (1998) (due process not violated even where prosecutor stated that the court had spent four days guaranteeing defendant's right to instructions on mitigation, fairness and mercy and that defendant was treated "much more fairly, and with much more mercy than he showed [the victim]...."). Accordingly, petitioner is not entitled to the grant of certiorari.

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[19] Moreover, Drake was not a constitutional decision.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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